Where a sub-watershed exceeds a MAL due to the MS4 discharge, the Permittees propose that the responsible Permittee be required to submit an "MAL Action Plan" to the Regional Water Board's Executive Officer. The plan would need to include an assessment of the sources responsible for the abnormal pollutant levels, the existing BMPs that address those sources, an assessment of additional BMPs and actions that could be implemented, and, based on such analyses, the additional BMPs and/or actions the responsible Permittee proposes to implement to achieve the MAL to the MEP. The Executive Officer, in approving the plan, would have the opportunity to identify additional BMPs or actions the Regional Water Board believes necessary to address the constituent of concern.

In summary, Permittees propose that MALs be used to identify poor performing catchments or sub-watersheds for pollutants of concern to implement further practical controls. Where MALs are exceeded, the Permittees, in conjunction and with approval by the Regional Water Board's Executive Officer would be required to implement additional actions deemed necessary to address the high concentration. Thus, MALs are used to elevate municipal responsibility in a manner that is reasonable and practical while improving water quality.

LEGAL AUTHORITY

- **Effectiveness of BMPs** (Section E.1.j, Page 24)
  The Tentative Order includes a new provision that requires the Permittees to demonstrate that they have the legal authority to require documentation on the effectiveness of BMPs. This provision is redundant with other requirements in the permit in that it ignores the fact that the New Development/Significant Redevelopment section of the DAMP (Section 7.0) establishes a process for the selection, design, and long-term maintenance of permanent BMPs for new development and significant redevelopment projects and requires developers to select BMPs that have been demonstrated as effective for their project category. In addition, it ignores the fact that the Permittees have already established legal authority for their development standards so that project proponents have to incorporate and implement the required BMPs.

  This provision should be deleted from the Order.

JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM

Development Planning Component

- **LID BMPs** (Section F.1.c.(2), Page 26)
  Provision F.1.c.2 identifies that the LID BMPs listed in the provision shall be implemented at all Development Projects where applicable and feasible, however no definition of "applicable and feasible" is identified in the provision or within the fact sheet. The determination of feasibility of implementing the LID BMPs identified in the provision should be the responsibility of the Permittees.

  It is recommended that the Provision be modified as follows:

  The following LID BMPs listed below shall be implemented at all Development Projects where applicable and feasible as determined by the permittee.

- **Infiltration and Groundwater Protection** (Section F.1.c.(6), Page 26)
  The Regional Board Response to Comments dated July 6, 2007 regarding this section makes reference to the Order No. R9-2002-0001 Fact Sheet and recommendations provided by the U.S. EPA Risk Reduction Engineering Laboratory related to restrictions on infiltration of stormwater. The Order No. R9-2002-0001 Fact Sheet references the document *U.S. Environmental Protection Agency. 1994. Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration. EPA 600 SR-94 051.* This document that is referenced as guidance for infiltration of stormwater is more than 15 years old and does not provide an adequate technical basis for many of the requirements related to infiltration of stormwater. A closer review of this document will show that the study evaluated the impact of industrial stormwater discharges into local groundwater. However, the site soil conditions had a poorly defined soil structure and included gravel. Thus stormwater from the industrial site was discharged in an almost direct conduit to the groundwater. The County would submit that the Tentative Order should require the Permittees to develop criteria for the use of infiltration BMPs that consider land use, runoff quality, groundwater depth, site soil conditions and other information relevant to groundwater protection. The Regional Board Response to Comments dated July 6, 2007 also identifies that language contained in the Tentative Order also allows the Permittees to develop alternative criteria to replace the suggested restrictions. As current drafted the restrictions are more than "suggestions" and are actually more restrictive than requirements for onsite septic systems currently being considered by the State Water Board. If the restrictions are "suggested" then they should not be required as provision but should be identified as suggested or removed from the permit. If the intent is to allow the Permittees to develop criteria for infiltration of stormwater than the provision should be that the Permittees should develop the criteria and the "suggested" criteria should be deleted form the permit.

  Since the Fact Sheet, and the Regional Board Response to Comments dated July 6, 2007 does not provide adequate technical basis for the requirements and the Regional Board Response to Comments dated July 6, 2007 identifies the requirements as "suggested", Section F.1.c.(6) should be deleted from the Tentative Order.

  Jurisdictional Runoff Management Program (JRMP) Section F.1.c.(6)(g) restricts the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic. High vehicular traffic is defined as 25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway. There is no specific technical basis for this restriction or the definition of "high vehicular traffic" included within the Fact Sheet and the reference to the EPA Guidance in the Regional Board Response to Comments dated July 6, 2007 does not provide an adequate technical basis. As such, prescriptive requirements should not be included in the Tentative Order unless there is a strong technical basis. Although SWRCB Order WQ 2000-11 provides guidance on some of the restrictions on the use of infiltration treatment control BMPs contained in the Tentative Order, there is no mention of restrictions related to areas subject to high vehicular traffic. Moreover, we are not aware of any demonstrated relationship between traffic counts and frequency of materials deposited on the street.

- **Native/Low Water Landscaping** (Section F.1.c.(7), Page 27)
  This new provision identifies that landscaping with native or low water species where feasible shall be preferred in areas that drain to the MS4 or waters of the U.S. It is unclear to the County as to the nexus between the use of native plants and runoff water quality. For what purpose does this provision have to protect water quality and beneficial uses? This provision would appear to be outside the jurisdiction of the Regional Board.

- **Standard Stormwater Mitigation Plans (SSMPs)** (Section F.1.d, Page 27-28)
  Section F.1.d. requires each Permittee to implement an updated local SSMP within twelve months of adoption of the Order. The schedule for the update of the SSMP is overly aggressive and does not allow the time necessary for the Permittees to incorporate changes and implement an updated SSMP. This provision adds language that requires the inclusion of the hydromodification requirements in provision F.1.h in an updated local SSMP within one year of the adoption of the Order. The requirements in provision F.1.h include the development of watershed specific HMPs within two years of adoption of the Order. The timeframe to update the local SSMPs in Provision F.1.d should be consistent with the time frame identified to develop the watershed specific HMPs in provision F.1.h.

  It is recommended that the Provision be modified as follows:

  Each Copermittee must implement an updated local SSMP, upon completion of the watershed specific HMP(s) in their jurisdiction, which meets the requirements of section F. 1. d. of this Order and (1) reduces Priority Development Project discharges of storm water pollutants from MS4 to the MEP, (2) prevents Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, (3) manages increases in runoff discharge rates and durations from Priority Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollution generation, or other impacts to beneficial uses and stream habitat due to increased erosive force and (4) implements the hydromodification requirements in section F.1.h.

- **Priority Development Project Categories** (Section F.1.d.(2), Page 29)
  The Regional Board Response to Comments dated July 6, 2007 regarding this section does not provide any technical basis for requiring that a new Development project feature requires the <u>entire</u> project footprint being subject to SSMP requirements. The Response to Comments only mentions that the provision is "a particularly important requirement since municipalities have greater latitude during development to require pollution prevention than they have with existing development", however pollution prevention is not required from land uses that are <u>not</u> Priority Development Project Categories and so the Response to Comments fails to address this potential situation and does not provide any technical basis for the provision. Furthermore, this requirement, Provision F.1.d.(2), appears in direct conflict with Provision F.1.d.(1)(b) which defines the area subject to SUSMP requirements. Given that provision F.1.d.(1)(b) is consistent with Board Order WQ 2000-11, provision F.1.d.(2) should be deleted. Since the previous comments on this issue were not addressed in the Regional Board's Response to Comments, the comments are being resubmitted.

Section F.1.d.(2) defines Priority Development Project Categories. In an introduction to the listed categories, this section states that, where a new development project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements. As currently written this provision would require a new development that has a 5,000 square foot parking lot feature and 100,000 square feet of other land uses that are not Priority Development Project Categories, to provide treatment for the entire project (105,000 square feet). This requirement would unduly burden the landowner in this case with the cost of treating runoff from 105,000 square feet when only 5,000 square feet should be subject to SUSMP requirements and treatment controls.

The need to treat runoff from a greatly increased land area will require an increase in the size of treatment controls, which will increase the volume of water treated without a likely commensurate increase in pollutant removal. This requirement will unnecessarily increase the cost of treatment control BMPs without commensurate pollutant removal benefits and likely discourage re-development.

The Fact Sheet fails to provide any information showing that development land uses that are not in the Priority Development Project Category contribute pollutants to the MS4 and are a threat to water quality. The Fact Sheet (page 78) states that this provision "is included in the Order because existing development inspections by Orange County municipalities show that facilities included in the Priority Development Project Categories routinely pose threats to water quality. This permit requirement will improve water quality and program efficiency by preventing future problems associated with partially treated runoff from redevelopment sites. This explanation does not demonstrate any connection between development land uses that are not in the Priority Development Project Category and the observed "threats to water quality." In addition, although the explanation focuses on the water quality benefits for redevelopment projects, the Section is for "new development" projects".

Since the Fact Sheet does not provide any technical information showing that land uses that are not Priority Development Project Categories are a significant source of pollutants and a threat to water quality, the introductory paragraph of Section F.1.d.(2) subjecting the entire project footprint to SUSMP requirements should be removed from the permit.

- **Commercial Developments** (Section F.1.d.(2)(b), Page 29)
  Section F.1.d.(2)(b) lowers the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 square feet (2.3 acres) to one acre. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. However, EPA Phase II guidance is not relevant to a Phase I permit.

  The Fact Sheet also states that this Provision is based on Permittee findings that smaller commercial facilities pose high threats to water quality. This is not the case. The Permittees indicated that commercial facilities of 100,000 square feet or less receive a score of 3 out 5 (a medium threat) in Table 9-8 in the 2007 DAMP. Since the Fact Sheet does not provide any technical basis for lowering the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 (2.3 acres)

square feet to one acre, the category should be described as, "Commercial developments greater than 100,000 square feet."

- **Industrial Developments** (Section F.1.d.(2)(c), Page 29)
  Section D.1.d.(2)(c) requires industrial developments of greater than one acre to comply with SUSMP requirements. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. Again, EPA Phase II guidance is not relevant to a Phase I permit. In addition, the Fact Sheet does not provide a technical basis for adding industrial sites to the Priority Development Project Categories and consequently Section D.1.d.(2)(c) should be deleted from the permit.

- **Streets, Roads, Highways, and Freeways** (Section F.1.d.(2)(i), Page 30)
  Section F.1.d.(2)(i) includes as a Priority Development Project Category streets, roads, highways, and freeways including any paved surface of 5,000 square feet or greater that is used for transportation. Highways and freeways are not the jurisdiction of Permittees and fall under the jurisdiction of the California Department of Transportation, which is regulated by its own statewide stormwater permit.

  It is recommended that the Provision be modified as follows:

  (i) Streets and roads~~, highways, and freeways~~. This category includes streets and roads ~~any paved surface~~ that ~~is~~ are 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

- **Retail Gasoline Outlets** (Section F.1.d.(2)(j), Page 30)
  Section F.1.d.(2)(j) includes as a Priority Development Project Category Retail Gasoline Outlets (RGOs) that meet the criteria of 5,000 square feet or more or have a projected Average Daily Traffic (ADT) of 100 or more vehicles per day. SWRCB Order WQ 2000-11 provides guidance on whether RGOs are subject to SUSMP requirements. The State Board states in this Order that "In considering this issue, we conclude that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. Moreover, in light of the small size of many RGOs and the proximity to underground tanks, treatment may not always be feasible, or safe." Although the State Board does not prohibit subjecting RGOs to SUSMP requirements, the State Board provides a number of reasons for not doing so, including that fact that RGOs are already heavily regulated. It should also be noted that the DAMP already prescribe a suite of BMPs specific to RGOs. Subjecting RGOs to SUSMP requirements imposes duplicity where it is not needed. Section F.1.d.(2)(j) should be removed from the permit.

- **LID Site Design BMP Requirements** (Section F.1.d.(4), Page 30-33)
  This provision identifies that each Permittee must require LID stormwater practices or make a finding of infeasibility for each Priority Development Project (PDP) for inclusion of LID. This provision effectively requires each PDP to perform an analysis of the applicability of LID BMPs for a given project and either incorporate LID BMPs into the project or provide documentation that supports a finding that LID BMPs cannot be incorporated, which presents a significant change in the way development projects are planned and designed and presents an additional burden on developers and municipal plan checkers.

The Tentative Updates and Errata document released on May 5th changes this language by specifying that each Permittee must require a project to include LID stormwater practices or, alternatively, participate in the LID substitution program described in Section F.1.d.(8). The analysis of the feasibility of LID BMPs is most appropriate to be included under this provision as the LID Site Design Substitution Program, as discussed later, is confusing and an unnecessary provision.

It is recommended that Section F.1.d.(4)(a)(i) not be changed per the Tentative Updates and Errata document release on May 5th and remain as worded in the March 13th Tentative Order as follows:

Each Copermittee must require LID storm water practices or make a finding of infeasibility for each Priority Development Project.

Section F.1.d.(4)(a)(iii) requires each PDP to perform an assessment of the potential for collection of stormwater for beneficial use on-site or off-site prior to discharging from the MS4. The language "discharging from the MS4" is confusing and the meaning should be defined or the language should be changed to "discharging to the MS4". There is no language in the Tentative Order that identifies how extensive the analysis should be and there is no supporting language in the Fact Sheet as to why this analysis should be done. The requirement to perform this assessment for off-site use, which is not defined, puts an undue burden on developers to identify potential uses beyond the area and control of the PDP. This provision likely goes beyond the authority of the Regional Boards per Water Code § 13360, which prohibits the Regional Board from specifying the manner of compliance with its regulations.

It is recommended that Section (a)(iii) of this provision be modified as follows:

The review of each Priority Development Project shall consider potential collection of storm water for beneficial use on-site prior to discharging to the MS4.

Section F.1.d.(4)(a)(vi) requires that within 365 days of adoption of the Order that each Permittee review its local codes and ordinances and identify barriers therein to implementation of LID stormwater practices. One year, however is not adequate time for each Permittee to identify barriers to LID in its local codes and ordinances as similar projects to identify barriers to LID have taken multiple years. A minimum of two (2) years should be provided for the Permittees to identify these barriers which would allow a thorough understanding of the types of barriers present in local codes and ordinances, and the time to create ordinances that are compatible and support the other stormwater program elements.

It is recommended that Section F.1.d.(4)(a)(vi) be modified as follows:

Within ~~365 days~~ two (2) years after adoption of this Order, each Copermittee must review its local codes and ordinances and identify barriers therein to implementation of LID storm water practices. Following the identification of these barriers to LID implementation, where feasible the Copermittee must take appropriate actions to remove barriers directly under Copermittee control by the end of the permit cycle.

Section F.1.d.(4)(b)(i) requires PDPs to maintain or restore natural storage reservoirs and drainage corridors in drainage networks in preference to pipes, culverts, and engineered ditches. The intent of the provision appears to be to assist in maintaining the pre-development hydrology, however this provision specifies how a PDP is to maintain the pre-development hydrology which may go beyond the limitations in Water Code § 13360.

It is recommended that Section F.1.d.(4)(b)(i) be modified as follows:

Consider maintaining or restoring natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams) in drainage networks in preference to pipes, culverts, and engineered ditches.

Section F.1.d.(4)(b)(ii) of this provision requires draining a portion of the impervious area to pervious areas before discharge to the MS4, specifying that the amount of runoff shall correspond to the total capacity of the pervious areas. Section (b)(iii) of this provision identifies that pervious or landscaped areas should be properly designed and constructed to effectively receive and infiltrate or treat runoff. The effect of these provisions requires that all landscaped and pervious areas are sized and designed as stormwater treatment devices, such as bioretention or vegetated swales. Using landscaped and pervious areas as stormwater treatment devices is not always feasible and is dependant on site specific constraints.

It is recommended that Section F.1.d.(4)(b)(ii) and Section F.1.d.(4)(b)(iii) of this provision be modified as follows:

Section F.1.d.(4)(b)(ii) - *Projects with landscaped or other pervious areas shall, where feasible, drain a portion of impervious areas (rooftops, parking lots, sidewalks, walkways, patios, etc) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall correspond with the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' soil conditions, slope, and other pertinent factors.*

Section F.1.d.(4)(b)(iii) - *Projects with landscaped or other pervious areas shall, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.*

- **LID Site Design BMPs Sizing and Design** (Section F.1.d.(4)(c), Page 33)
The Tentative Updates and Errata document released on May 5th (page 7) contains a new section which requires that LID structural site design BMPs to be sized and designed to ensure capture of the 85th percentile storm event for all flows from the development in accordance with Section F.1.d.(6)(a)(i) and Section F.1.h. The objective of Low Impact Development is for a development site to maintain pre-development site hydrology by implementing site-design techniques that function similar to natural processes. LID BMPs should therefore not be designed to capture the 85th percentile storm event but rather to capture the difference in volume between the 85th percentile

storm event for the pre-development condition and the 85th percentile storm event for the post-development condition (delta volume). By sizing and designing LID BMPs to the delta volume this will help to ensure that the pre-development hydrology is maintained which is the objective of the Low Impact Development stormwater approach. This new section also requires that any volume over and above the design capture volume, that is not captured by the LID BMPs shall be treated using conventional treatment control BMPs in accordance with Section F.1.d.(6). This language appears to require treatment beyond the 85th percentile storm event which unnecessary as most pollutants are removed through treatment or capture of the 85th percentile storm event, it is likely infeasible in many locations, and it would but an unnecessary burden on PDPs without much added pollutant removal benefit.

It is recommended that the Provision be modified as follows:

LID structural site design BMPs shall be sized and designed to ensure capture of the difference between 85th percentile storm event ("design capture volume")for the pre-development condition and the 85th percentile storm event ("design capture volume")for the post-development condition for all flows from the development or redevelopment project in accordance with Section F.1.d.(6)(a)i. and Section F.1.h below. ~~Any volume, over and above the design capture volume, that is not captured by the LID BMPs shall be treated using conventional treatment control BMPs in accordance with Section F.1.d.(6) below.~~

Alternatively the term "capture" as used in the Tentative Updates and Errata document released on May 5th should be defined as capturing water for treatment using LID BMPs and should not be defined as retention of the 85th percentile storm event. Retention of the 85th percentile storm event is an artificial metric that does not meet the objective of Low Impact Development which is to maintain pre-development site hydrology. If retention is used as the definition of capture there will be many development site locations where this will be infeasible due to site constraints. Capture should be defined as treatment of the 85th percentile storm event which is likely feasible at almost all development site locations. The benefits of LID are realized with the definition of capture as treatment, as retention will still occur on sites where it is feasible through infiltration and evapotranspiration, and on sites where retention is not feasible, vegetated LID BMPs will still provide treatment and volume reduction will occur through some infiltration and evapotranspiration.

Alternatively it is recommended that the Provision be modified as follows:

LID structural site design BMPs shall be sized and designed to ensure ~~capture~~ treatment of the 85th percentile storm event ("design capture volume") for all flows from the development or redevelopment project in accordance with Section F.1.d.(6)(a)i. and Section F.1.h below.

- **Treatment Control BMP Requirements** (Section F.1.d.(6)(f) and (g), Page 34)
  The Regional Board Response to Comments dated July 6, 2007 regarding this section does not provide any technical basis for these provisions and it does not adequately address the comments provided stating that "the concerns are addressed within the Tentative Order". Since the previous comments on this issue were not adequately

addressed in the Regional Board's Response to Comments, the comments are being resubmitted.

Section F.1.d.(6)(f) require treatment control BMPs be implemented prior to discharging into waters of the U.S. and provision F.1.d.(6)(g) requires that treatment controls not be constructed within waters of the U.S. or waters of the State. These provisions of the Tentative Order greatly limit the use of regional BMP and watershed-based approaches. The provisions demand a lot-by-lot approach in implementing BMPs that is analogous to the site-by-site septic tank approach that has been discredited as an effective strategy for sewage treatment in urban areas. Similarly, the Permittees submit that such an approach is also ineffective for stormwater and will lead to a diversion of limited resources to managing thousands of site-by-site treatment controls, which are managed by parties that have limited or no experience, instead of hundreds of regional controls, that are managed by parties and governmental agencies that have expertise in BMP management.

The Tentative Order encourages a renewed focus on the 'watershed approach' but the proposed restriction on regional BMPs is antithetical to a watershed approach. The USEPA in its *National Management Measures Guidance to Control Nonpoint Source Pollution from Urban Areas, Management Measure 5: New Development Runoff Treatment* dated November 2005 (page 5-38) states that "regional ponds are an important component of a runoff management program." and that the costs and benefits of regional, or off-site, practices compared to on-site practices should be considered as part of a comprehensive management program. The EPA guidance acknowledges that a regional approach can effectively be used for BMPs.

In addition, the Fact Sheet does not provide any technical justification for these provisions. Since neither the Findings nor the Fact Sheet provide any technical basis for precluding regional BMPs and EPA guidance recommends the use of regional BMPS, these provisions should be deleted from the permit.

- **LID Site Design BMP Substitution Program** (Section F.1.d.(8)(d), Page 36)
In the March 13th Tentative Order the provision has been modified to require that for PDPs participating in the Substitution Program that all LID site design BMPs meet the requirements in Section F.1.d.(4). As LID BMPs are now required in every PDP the Substitution Program essentially becomes a moot provision since if it is feasible to incorporate LID BMPs a PDP would most likely not need to include treatment control BMPs. The May 5th Tentative Updates and Errata document modifies this provision to include a feasibility analysis for PDPs where LID BMPs are not feasible. This new language effectively changes the meaning of Provision F.1.d.(8) from a LID Site Design BMP Substitution Program to a Treatment Control BMP Substitution Program as the Tentative Order requires LID site design BMPs unless they are demonstrated to be infeasible, which then Treatment BMPs appear to be able to be substituted.

  It is recommended that the Provision be deleted and that the LID feasibility provisions under Section F.1.d.(8)(d) from the May 5th Tentative Updates and Errata document be moved under Section F.1.d.4.(a)(i).

- **Treatment Control BMP Maintenance Tracking** (Section F.1.f, Page 38)
  The Regional Board Response to Comments dated July 6, 2007 regarding this section identifies that the provision has been modified to "allow the Permittees more latitude with verifying treatment control BMP operations through self-certification, third party inspection and/or verification by the Copermittee," however the self-certification program is required to comply with the same very prescriptive provisions. The Provision should be amended to properly allow the Permittees to develop a self-certification inspection program that will meet the intent of the provision without having pre-determined requirements which undermine the benefits of a self-certification inspection program.

  It is recommended that the Provision be modified as follows:

  (c) Verify implementation, operation, and maintenance of treatment BMPs by inspection, through the development of a self-certification BMP inspection program within 12 months of the adoption of this Order.

- **Requirements for Hydromodification and Downstream Erosion** (Section F.1.h, Page 39)
  Section F.1.h. discusses the hydromodification requirements for Priority Development Projects. The hydromodification provisions are of concern to the Permittees for several reasons.

  As a general matter, the hydromodification provisions may actually discourage smart growth and sustainable development and encourage urban sprawl. High density urban development generally does not have the space to allocate to onsite hydromodification controls. However, urban development has other water quality benefits such as incorporating subterranean parking garages, retail and office workspace, and residential space into a single impervious footprint. As a result, these types of developments have a much smaller impervious footprint than suburban developments that accommodate the same features. This Provision should be amended to include an exception for urban development based on impervious footprint.

  Section F.1.h.(3) (Page 40) requires each Permittee to implement, or require implementation of, a suite of management measures within each Priority Development Project to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels. This section should not apply to watersheds or watershed plans that already include sufficient hydromodification measures. For example, the County of Orange and major landowners, such as Rancho Mission Viejo have put in place a comprehensive watershed land use/open space strategy for the San Juan Creek Watershed/Western San Mateo Watershed which includes water quality/quantity management as an integral component. The Tentative Order should be amended to provide an exception to this section for those watersheds where a watershed plan that contains sufficient hydromodification measures has been developed.

  This section should also recognize that the common hydromodification management measures for complying with the hydromodification requirements don't necessarily apply directly to flood control projects.

Section F.1.h.3.(b) (Page 40) requires that management measures must be based on a sequenced consideration of site design measures, on-site management controls, and then in-stream controls. The provision does not include an option to address hydromodification on a regional or watershed basis. This provision should be amended to include an option to address hydromodification on a regional or watershed basis.

Section F.1.h.(3)(b)(i) (Page 40) requires that site design measures for hydromodification must be implemented on all Priority Development Projects. It is neither necessary nor prudent to require hydromodification controls on all priority projects. Some priority projects may be too small to have hydromodification effects and some may discharge into engineered channels, which makes these measures unnecessary. The receiving channel must always be part of the assessment of whether hydromodification controls will be required. This Provision should be amended to include language that the controls are required unless a waiver per paragraph (c) of this section is granted.

- **Hydromodification & Engineered Channels** (Section F.1.h.3.(c)(ii), Page 41) Provision F.1.h.3.(c)(ii) has been deleted, which removes the waiver of hydromodification requirements for those PDPs that discharges to concrete-lined or significantly hardened channels downstream to their outfall in bays or the ocean. The waiver for PDPs that discharge to concrete-lined or significantly hardened channels should be included as hydromodification requirements are not appropriate for channels that are designed to accept increased flows from upstream development as the potential for erosion is minimal or not present. The fact sheet does not provide any discussion under this provision of why the waiver was removed and the discussion under Finding D.2.g does not adequately address hydromodification requirements related to concrete-lined or significantly hardened channels.

  It is recommended that the Provision providing conditional waivers for hydromodification requirements for concrete-lined or significantly hardened channels be added back into the Tentative Order.

- **Hydromodification Management Plans** (Section F.1.h.(4) & (5), Page 41-43) Provisions F.1.h.(4) & (5) have been modified to require the development of watershed-specific Hydromodification Management Plans that include specific criteria for minimizing and mitigating hydrologic modification at all development and redevelopment projects within two years of adoption of the Order. The timeframe for development of HMPs for each watershed is too short to ensure an optimized program. Interim criteria assures that there will not be unregulated construction in the interim. A minimum of three years, which was the length of time to develop criteria identified in the previous Tentative Order, should be allowed for their development.

  It is recommended that the Provisions be modified as follows:

  Section F.1.h.(4) - *Each Copermittee must revise its SSMP/WQMP to implement a watershed specific Hydromodification Management Plan (HMP) to include specific criteria for minimizing and mitigating hydrologic modification at all development and redevelopment projects, unless hydromodification requirements have already been developed for a watershed which can be integrated into the SSMP/WQMP.*

Section F.1.h.(5) (a) - *Within ~~2~~ 3 years of adoption of the Order, the Permittees shall submit to the Regional Board a draft HMP that has been reviewed by the public, including the analysis that identifies the appropriate limiting range of flow rates.*

- **Interim Hydromodification & Effective Impervious Area** (Section F.1.h.(6)(i), Page 43)
  Section F.1.h.(6)(i) has been modified to require, as an interim measure that each PDP, not just projects disturbing 20 acres or more, disconnect impervious areas by reducing the percentage of Effective Impervious Area to less than five percent of total project area. EIA is not an adequate metric for hydromodification as there is a lack of a technical consensus on a performance standard relating the disconnection of impervious area and either water quality or hydromodification. This performance standard will ultimately be a very land intensive requirement which may promote sprawl and not conserve natural areas. The 5% EIA number was originally identified in the context of watershed imperviousness and not for a specific development site. The fact sheet identifies that the 5% EIA number was added in direct response to comments from the USEPA on Tentative Order R9-2008-001, however USEPA, in several statements made by Dr. Cindy Lin at the November 14, 2008 CASQA General Meeting, suggested that the 5% EIA metric should only be considered as an example and that USEPA is open to consideration of other metrics for LID. It is unclear whether the language in the Tentative Updates and Errata document released on May 5th replaces and removes the 5% EIA metric from the Tentative Order or if the language is in addition to the 5% EIA metric. In addition the new language from the Tentative Updates and Errata document released on May 5th should be based on the 85th percentile storm event runoff volume.

  It is recommended that the current language of the Draft North Orange County permit be substituted.

Construction Component

- **Permit Fees**
  Since the previous comments on this issue were not addressed in the Regional Board's two Response to Comments documents, the comments are being resubmitted.

  Although not directly addressed within the Tentative Order, the Permittees take issue with the requirement that they must pay a significant fee for the municipal stormwater permit, which covers their construction responsibilities and are also required to pay an additional fee when they submit an NOI to obtain coverage under the Statewide Construction General Permit.

  Since there is some discretion in how the Regional Water Board addresses these fees, the Permittees request that their municipal stormwater fees cover all municipal activities including construction and that they not be held liable for additional fees when submitting NOIs.

- **BMP Implementation** (Section F.2.d, Page 46-47)
  The previous comments on this issue made by the Permittees were not addressed in the Regional Board's two Response to Comments documents, and are therefore resubmitted.

Section F.2.d.(1)(a)(ii) requires the development and implementation of a site-specific stormwater management plan. To make the language consistent with the changes made to Section F.2.c.2 (Page 46), the County suggests the following change:

(ii) Development and implementation of a site-specific ~~stormwater management plan~~ erosion and sediment control plan (or equivalent BMP plan);

Section F.2.d.(1)(c)(i) (Page 48) states that the Permittees must require implementation of advanced treatment for sediment at construction sites that are determined to be an exceptional threat to water quality.

The Fact Sheet provides no justification for this requirement. The newly released draft Statewide Construction General Stormwater Permit identifies the Active Treatment System (ATS) as an advanced sediment treatment technology. The ATS prevents or reduces the release of fine particles from construction sites by employing chemical coagulation, chemical flocculation, or electrocoagulation to aid in the reduction of turbidity caused by fine suspended sediment. The recently released (April 2009) Draft Construction General Stormwater Permit does not require use of ATS but identifies it as an available BMP. However, that permit acknowledges that the ATS is a newly emerging technology in California.

The provisions requiring the use of ATS should be deleted from this permit, and the selection of BMPs for construction operations, especially an ATS, should be done under the aegis of the Statewide Construction General Stormwater Permit.

- **Construction Reporting of Non-compliant Sites** (Section F.2.g.(2), Page 50)
This new provision requires that each Permittee must annually notify the Regional Board of all construction sites with potential violations prior to the commencement of the wet season. This reporting requirement should be limited to the sites meeting the criteria specified in F.2.e.1 that are required to be inspected in August and September of each year.

  The County recommends the following modifications.

  Each Copermittee shall annual notify the Regional Board, prior to the commencement of the wet season, of all construction sites inspected in accordance with F.2.e.4 that meet the criteria specified in F.2.e.1, with potential violations. ..."

Municipal

- **Flood Control Structures** (Section F.3.a.(4)(c), Page 53)
Section F.3.a.(4)(c) requires the Permittees to evaluate existing flood control devices to identify those that are causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structure. This provision is problematic for several reasons as described below.

  The federal regulations [40 CFR, Part 122.26(d)(2)(vi)(A)(4)] focus on evaluating flood control devices and determining if retrofitting the device is feasible. The regulations

state:

> (4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from stormwater is feasible.

The language should be modified so that it is aligned with the current stormwater permit, recognizes the work that has been completed, is consistent with the intent of the federal regulations, and is consistent with the justification within the Fact Sheet. The proposed language modification is as follows:

> (4). BMP Implementation for Flood Control Structures
> (c) Each Permittee who owns or operates flood control devices/facilities must continue to evaluate its existing flood control devices/facilities, ~~identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution,~~ as needed and identify opportunities and the feasibility of configuring and/or reconfiguring channel segments/structural devices to function as pollution control devices to protect beneficial uses. The ~~inventory and~~ updated evaluation must be completed by July 1, 200~~8~~10 and submitted to the Regional Board with the Fall 200~~8~~10 annual report.

- **Infiltration from Sanitary Sewer to MS4** (Section F.3.a.(7), Page 54)
  Although the first portion of the Tentative Order provision (7)(a) is consistent with the current permit (Order No. R9-2002-0001), the Permittees submit that the provisions regarding sanitary sewer maintenance are more applicable to sanitary sewer agencies, not stormwater agencies. It is inappropriate to include sanitary sewer maintenance requirements in a stormwater permit even where the two systems may be operated by the Permittee. Where similar maintenance requirements are included in the wastewater treatment plant or collection system permit[13], these provisions are an unnecessary duplication of other regulatory programs. On a similar issue, the State Board stayed a provision in the existing permit finding that "the regulation of sanitary sewer overflows by municipal storm water entities, while other public entities are already charged with that responsibility in separate NPDES permits, may result in significant confusion and unnecessary control activities." [emphasis added] (WQ 2002-0014 at p.8). Therefore we submit that part (a) of the provision (7) should be deleted from the Tentative Order.

  While the Permittees agree that stormwater agencies must also address aspects of sanitary sewer incursions into the MS4s, the provisions in (7)(b) are aspects of other portions of the stormwater program and should be moved to those sections of the Tentative Order.

[13] The State Water Resources Control Board has adopted the Statewide General Waste Discharge Requirements (WDRs) for Sanitary Sewer Systems, Water Quality Order No. 2006-0003 (Sanitary Sewer Order) on May 2, 2006 and the Regional Water Board adopted Order No. R9-2007-0005 on February 14, 2007 (which is more stringent and prescriptive than the Statewide General WDRs).

The proposed changes include:

i. *Adequate plan checking for construction and new development* – incorporate in the Construction and New Development programs
ii. *Incident response training for municipal employees that identify sanitary sewer spills* – incorporate in the Illegal Discharges/Illicit Connections (ID/IC) program.
iii. *Code enforcement inspections* – delete, this is covered by other programs
iv. *MS4 maintenance and inspections* – incorporate in the Municipal program, provision D.3.a(6).
v. *Interagency coordination with sewer agencies* – incorporate in the ID/IC program
vi. *Proper education of municipal staff and contractors conducting field operations on the MS4 ~~or municipal sanitary sewer (if applicable)~~* – incorporate in the Municipal program

Commercial/Industrial

- **Commercial Sites/Sources** (Section F.3.b.(1)(a)(i), Page 57)
The Tentative Order added four new categories of commercial sites/sources: food markets, building material retailers and storage, animal facilities, and power washing services. The Fact Sheet notes that these facilities were added because these activities were identified as potentially significant sources of pollutants in annual reports.
While we agree that sites/sources that are identified by the Permittees as contributing a significant pollutant load to the MS4 should be incorporated into the inventory, we disagree with adding them to the list in the Tentative Order unless universally identified, by all the Permittees as a significant source.

  The determinations of significance need to be made at a local level and incorporated into the local JURMP. As noted in the Regional Board's first response to comments document in discussing the balance of flexibility and enforceable criteria:

  "... the Tentative Order sets numeric criteria regarding commercial inspections, but relies on each Copermittee to select inspection targets based on its local knowledge."

  It is important that these determinations be made at a local level and if identified as a common problem, then apply the requirement applied countywide, otherwise the Board staff may inadvertently be diverting resources from high priority issues to lower priority issues in some areas.

  The new categories should be deleted from the Tentative Order and, instead, recognize that those sites/sources have been locally determined to contribute a significant pollutant load to the MS4 be should be incorporated into the local JURMP(s).

- **Mobile Businesses** (Section F.3.b(3)(a), Page 59)
The Tentative Order adds a new requirement to develop and implement a program to address discharges from mobile businesses. The program must include the identification of BMPs for the mobile business, development of an enforcement strategy, a notification effort, the development of an outreach and education program, and inspection as needed.

In our previous comment letter we noted the difficulties associated with initiating this program, concerns which were mirrored in the Fact Sheet. For the reasons previously noted and acknowledged by the Regional Board, we request that the requirement for this program be changed to the development of a pilot program for the mobile business category. The pilot program would allow the Permittees to work together on a regional basis to develop an appropriate framework for addressing mobile business and determine whether the program is effective prior to expending a significant amount of resources on multiple categories of mobile businesses.

- **Inspection of Industrial and Commercial Sites/Sources** (Section F.3.b(4)(b), Page 60)
  This new provision requires that each Permittee must annually notify the Regional Board of all commercial and industrial sites/sources with potential violations prior to the commencement of the wet season. Similar to the new requirement for inspecting and reporting non-compliant construction sites, this requirement is ambiguous and subject to potential misinterpretation because Permittees do not inspect all commercial and industrial sites/sources each year.

  This reporting requirement should be revised so that it does not imply an expansion of the inspection frequency or change in inspection timing than that identified in the subsequent findings and JURMPs.

  Each Permittee shall annual notify the Regional Board, prior to the commencement of the wet season, of ~~all~~ the Industrial Sites and Industrial Facilities subject to the General Industrial Permit or other individual NPDES permit with potential violations that were inspected within the preceding 6 months."

- **Food Facility Inspections** (Section F.3.b.(4)(d), Page 61)
  The Permittees appreciate the elimination of the proposed expanded requirement to address maintenance of greasy roof vents. As noted in our April 2007 comments, the existing Food Facility Inspection program, which focuses on the major water-quality related issues associated with restaurants including disposal methods for food wastes, fats, oils and greases, wash water, dumpster management and floor mat cleaning has be shown to be effective. The Permittees submit that the additional expanded requirement, (c)(iv) identification of outdoor sewer and MS4 connections, either be deleted from the Tentative Order or the subject of further technical justification of its need for this successful program element.

- **Third Party Inspections** (Section F.3.b(4)(e), Page 61)
  The previous comment on this issue was not addressed in the Regional Board's two Response to Comments documents, and is therefore resubmitted. The Tentative Order includes new, prescriptive requirements for third party inspections that provide a significant amount of detail as to how the inspection program must be managed. However, the Findings and the Fact Sheet do not address the need for these expanded requirements or provide any rationale as to how these new requirements would make the third-party inspection program more effective.

In fact, this level of detail should be determined locally and should be included as a part of the program within the model DAMP and local JURMPs. After the inclusion of the industrial and commercial inspection programs in the third term permit, the Permittees determined that they could leverage their resources by utilizing and expanding upon existing inspection programs to assist them in complying with the permit instead of creating duplicative inspection programs. The ability to utilize third-party inspections as an effective part of the program, has allowed the Permittees to maximize their resources. An example of a third party inspection program that has been developed and implemented is the use of the Orange County Health Care Agency (OCHCA) inspectors to assist the Permittees in inspecting 10,000 restaurants countywide on an annual basis. The Permittees have developed this program in conjunction with OCHCA so that it is only an incremental burden on their limited resources, effective, and allows for clear communication between the inspectors and the Permittees.

Since the Permittees have already developed an effective framework for a third-party inspection program, provisions (i)(a) through (i)(d) are unnecessary and should be deleted from the Tentative Order.

- **Retrofit Existing Development** (Section F.3.d, Pages 65-66)
  This new provision requires that each Permittee must implement a retrofitting program for existing developments (i.e. municipal, industrial, commercial, residential). These new requirements present a significant change and present a substantial burden to the municipal stormwater program.

  Currently, new development requirements are imposed as conditions of approval for new projects and projects that are voluntarily undergoing redevelopment. A thorough legal review is required to determine whether municipalities have the authority to compel land development requirements absent a voluntary land development application and if such authorities can be developed given other legal constraints.

  The Permittees do not concur with the statement of the Regional Board in the supplemental fact sheet that "Retrofitting existing development is practicable for a municipality..." The Permittees request that the Regional Board provide a technical justification for this statement. A systematic evaluation of the technical and legal opportunities and constraints of a requirement to require retrofitting, especially of private landowners, is necessary to determine whether or not such a requirement is practicable. The evaluation must precede the permit provision to mandate MS4s require retrofitting of existing development.

  These provisions of the permit represents an entire new approach to existing development that places an unknown significant burden on the Permittees and ultimately to property owners in the south Orange County area. The Permittees therefore request that this unprecedented requirement be eliminated from the permit.

ID/IC Program

- **Investigation/Inspection and Follow Up** (Section D.4.e(2)(b) and (c), Page 68-69)

  The County appreciates the acknowledgement of the concern in the Regional Board's first Response to Comments document regarding the intent of the permit language.

However the language of the Tentative Order was not altered to match the Regional Board's stated intent that the investigation must be initiated within the specified timeframe. The requirements in the Tentative Order are that the Permittees must conduct the investigation within the specified time frame.

The following language changes are requested within the Tentative Order to better meet the intent of this requirement as stated by the Regional Board.

(b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Permittees must either ~~conduct~~ initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.

(c) Analytical data: Within two business days of receiving analytical laboratory results the exceed action levels, the Permittees must either ~~conduct~~ initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.

Watershed Urban Runoff Management Program (Section G, Page 70)
The Tentative Order includes increasingly prescriptive requirements for the Watershed Urban Runoff Management Program (WURMP). The Fact Sheet states that the increased prescriptiveness for the WURMP provision was necessary because enforceability of the permit has been a critical aspect. The Fact Sheet further states that:

> "For example, the watershed requirements of Order No. R9-2002-01 were some of the Order's most flexible requirements. This lack of specificity in the watershed requirements resulted in inefficient watershed compliance efforts. This situation reflects a common outcome of flexible permit language. Such language can be unclear and unenforceable, and it can lead to implementation of inadequate programs[14]."

Not only do the Permittees take strong exception to this statement, but the Fact Sheet is inconsistent with the Findings, which simply state that the WURMPs need to focus on the high priority water quality issues. In addition, the Fact Sheet does not acknowledge any of the notable Permittee successes including 1) the development of a South Orange County Integrated Regional Watershed Management Plan (IRWMP), which resulted in a $25 million IRWMP competitive grant award, (2) the 303(d) de-listing efforts that are ongoing and have been submitted for consideration; and 3) the efforts of the County of Orange and major landowners, such as Rancho Mission Viejo to put in place a comprehensive watershed land use/open space strategy for the San Juan Creek Watershed/Western San Mateo Watershed through the approved Southern Subregion Habitat Conservation Plan (HCP) and Special Area Management Plan (SAMP) both of which include water quality/quantity management as an integral component.

[14] Fact Sheet/Technical report for Tentative Order No. R9-2007-0002, page 10

The Permittees submit that the increased prescriptiveness of the Tentative Order is unwarranted and antithetical to a watershed management approach, which should be founded on a stakeholder driven process. Successful watershed-based programs follow a stakeholder driven process and are developed from the "bottom-up" not from the "top-down". The Permittees must be given latitude in how the watershed-based programs are developed and implemented, especially since many of the pollutants of concern (Cu, Zn, pesticides, pathogen indicators, etc.) and issues are the same within and among watersheds.

The language must be modified to provide the flexibility that is necessary within a watershed management program (similar to the language in Order No. R9-2002-0001) and, instead, focus on the major objectives for the program. Some language changes that would assist the Board in making these changes are provided below.

- **Lead Watershed Permittee** (Section G.1.a, Page 71)
  The Tentative Order has designated which entity within the watershed should be the default lead Permittee and what those responsibilities entail. The Permittees contend that this level of detail is inappropriate for a permit provision and should, instead, be a collaborative decision that is made among the various watershed stakeholders based on locally determined criteria and needs.

  The Permittees propose that the language be modified as follows:

  a. Lead Watershed Permittee Identification
     Watershed Permittees ~~may~~ must identify the Lead Watershed Permittee for their WMA. ~~In the event that a Lead Watershed Permittee is not selected and identified by the Watershed Permittees, by default the Permittee identified in Table 3 as the Lead Watershed Permittee for that WMA must be responsible for implementing the requirements of the Lead Watershed Permittee in that WMA.~~ The Lead Watershed Permittees ~~must~~ will serve as liaisons between the Permittees and Regional Board, where appropriate.

- **BMP Implementation and Assessment** (Section G.1.e, Page 74)
  The Tentative Order requires an arbitrary minimum number of watershed activities to occur in each year. The Fact Sheet states that the Permittees have completed the assessments, prioritization, and collaboration and now need to implement the activities identified.

  While the Permittees agree that there are activities that will be undertaken in conformance with the WURMP, the Tentative Order should not presuppose that the Permittees will not follow through with implementation of the WUMRPs now they have been developed. Since this requirement is unfounded, onerous, arbitrary, and dictates a top-down approach for managing the watersheds, the language should be modified to incorporate the flexibility necessary for the stakeholders to identify the BMPs to be implemented and the details of that implementation.

  The Tentative Order language should be modified to remove the prescriptive detail and incorporate more flexible language that will ensure that the WURMPs contain performance standards, timeframes for implementation, responsible parties and methods for measuring the effectiveness of their programs.

Fiscal Analysis (Section H, Page 78)
Section F of the Tentative Order requires the Permittees to secure the resources necessary to implement the permit, conduct a fiscal analysis of the stormwater program, and develop a long-term funding strategy and business plan. While the Permittees agree with Board staff that there is an identified need to prepare a fiscal reporting strategy to better define the expenditure and budget line items and to reduce the variability in the reported program costs and have committed to do such in the ROWD, the Permittees take exception to the requirement to develop a long-term funding strategy and business plan. The concerns for these new requirements are discussed in further detail below.

- Long Term Funding Strategy and Business Plan (Section H.3, Page 78)

The Tentative Order requires that each Permittee submit a funding business plan that identifies the long-term strategy for program funding decisions. The Fact Sheet states that this requirement is based on the need to improve the long-term viability of the program and is based on the 2006 *Guidance for Municipal Stormwater Funding* from the National Association of Flood and Stormwater Management Agencies (NAFSMA). The Fact Sheet further indicates that, without a clear plan, that the Board has uncertainty regarding the implementation of the program.

The Permittees have a demonstrated history of compliance and leadership in developing, implementing and adequately funding the stormwater program. Regardless of the source of funds, a historical review of the expenditures to date provide undisputable evidence that the Permittees are dedicated to the program, plan their budgets accordingly, and have adequately funded the program for the past 16 years. In our previous comments we provided a historical review of the shared and individual costs of program implementation that demonstrates the commitment of the Permittees to funding the program. It is an unnecessary diversion of the Permittees resources to invest in the development of a new tool for a program component that has been successfully met for 16 years.

The Regional Board staff relies on the 2006 NAFSMA *Guidance for Municipal Stormwater Funding* to justify this new requirement. We note that this national guidance document was developed to provide a resource to local governments as they address stormwater program financing challenges and primarily focuses on the considerations and requirements for developing a service/user/utility fee. While the guidance document states that the most "successful" programs have developed a business plan, such guidance is not a one size fits all approach, and in light of the history of the Orange County Program it is not warranted and should be removed from the permit.

- **TMDLs** (Section I, Page 79)
  This new provision supports Finding E.12 and identifies that adopted TMDL WLAs will be incorporated as numeric effluent limits for specific pollutants and watersheds.

  As noted previously in these comments (see comments on Finding E12), the County has significant reservations about the use of either Clean Up and Abatement Orders (as indicated in the TO) or Cease and Desist Orders (as indicated in the supplemental Tentative Fact Sheet) as the means by which to incorporate forthcoming TMDL WLAs into the MS4 permit. The Permittees request an explanation as to why the Regional Water Board plans to use these two types of enforcement tools to specify TMDL requirements.

Also as noted previously, the Permittees are concerned that it appears the Regional Board plans to incorporate WLAs as numeric effluent limits in the stormwater permit without consideration of other options or as to how the TMDL may be written, which might include:

- Requiring implementation of specific BMPs in the permit;
- Providing a recommended menu of potential BMPs in the TMDL, implementation plan, or the permit for sources to evaluate and select;
- Referencing BMP performance standards in the TMDL, implementation plan, or the permit;
- Recommending the selection of BMPs and developing benchmark values or performance measures; and
- Requiring the review of existing BMPs and selecting additional BMPs to achieve progress.

The USEPA draft handbook *TMDLs to Stormwater Permit* lists the above options and notes that:

> "There are no guidelines for determining which approach is most appropriate to use. It is likely that a variety of factors, including type of source, type of permit, and availability of resources, will influence which approach makes the most sense."

It does not appear that the Regional Board has consider the variety of factors in determining that numeric effluent limitations are most appropriate method of incorporating the WLAs for all pollutants in all watersheds into the MS4 stormwater permit.

Program Effectiveness Assessment (Section J, Page 79)

The previous comments on this issue made by the Permittees were not addressed in the Regional Board's two Response to Comments documents, and are therefore resubmitted.

Section J. of the Tentative Order requires the Permittees to assess the effectiveness of their JURMP, identify necessary program modifications, and report that information to the Regional Water Board on annual basis. Section J.1.a. identifies specific water quality-based objectives for 303(d) listed water bodies, environmentally sensitive areas (ESAs), and the major program components.

Although the concept and intent of the provision is understood and supported by the Permittees, the specificity and inclusion of the required water quality-based objectives and focus on the 303(d) listed water bodies and ESAs is misplaced and has not been developed within the context of the California Stormwater Quality Association (CASQA) Guidance, the existing Orange County program effectiveness assessment framework and metrics, or the recommendations within the ROWD (Section 1.2.2). In addition, the Tentative Order also requires that each Permittee conduct their own assessments including integrated assessments, which are more effective on a regional scale and over a longer timeframe. As written, this section of the Tentative Order does not provide flexibility for the Permittees to develop objectives and an overall strategy for the effectiveness assessment and will result in resources being expended without achieving the intended goal.

Since the Permittees have already developed and implemented a program effectiveness assessment framework and programmatic and environmental performance metrics and have

committed to developing metric definitions and guidance to improve the efficacy of the assessments in the ROWD, the provision should be modified to allow the Permittees to functionally update their long-term effectiveness assessment approach. The updated approach would build on the existing framework that has been utilized within the County for the past four years as well as the CASQA Municipal Stormwater Program Effectiveness Assessment Guidance Document, May 2007, and would assess the jurisdictional, countywide, and watershed-based elements of the stormwater program. The long-term strategy would include the purpose, objectives, and methods for the assessments and achieve the Regional Water Board staff objectives.

The proposed language, which is provided below, would replace J.1. and J.2. of the Tentative Order and is based on the current permit requirements.

The proposed language is:

a. As part of its individual JURMP, each Permittee shall update their long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP based on lessons learned from the existing program framework and available guidance. The long-term assessment strategy shall identify the purpose, objectives, methods and specific direct and indirect measurements that each Permittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.

b. As part of its individual Jurisdictional URMP Annual Report, each Permittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy. The updated long-term strategy shall be submitted within 365 days after adoption of the permit.

c. Long-term strategy for assessing the effectiveness of the Watershed URMP. As part of the WURMPs, the watershed Permittees shall update their long-term strategy for assessing the effectiveness of the WURMPs based on lessons learned from the existing program framework and available guidance. The long-term assessment strategy shall identify the purpose, objectives, methods and specific direct and indirect performance measurements that will track the long-term progress of Watershed URMP towards achieving improvements in receiving water quality impacted by urban runoff discharges. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment. The updated long-term strategy shall be submitted within 365 days after adoption of the permit.

Reporting (Section K, Pages 83-85, and Section G, Page76)

The previous comments on this issue made by the Permittees were not addressed in the Regional Board's two Response to Comments documents, and are therefore resubmitted. Section H of the Tentative Order requires the Permittees to submit the following reports:

- Individual and Unified JURMP annual reports - September 30 of each year (July 1 – June 30)
- Individual and Unified WURMP annual reports - January 31 of each year (July 1 – June 30)

Although the Permittees understand that the Tentative Order included these changes to allow for a longer time period between the two sets of submittals, the Permittees would receive more benefit from keeping the two timelines for the submittals aligned. As such, the language should be revised so that the JURMPs and WURMPs are submitted January 31 of each year. This will allow the Permittees to assess their stormwater program and water quality monitoring program and conduct an integrated assessment to identify water quality improvements.

Section G.4. requires that the Permittees submit the Aliso Creek WURMP annual report by March 1 of each year for the period January – December of the previous year. Since the Watershed Action Plan Annual Report for the Aliso Creek Watershed has historically been submitted in November of each year and has been based on the fiscal year like the other WURMP reports, it is unclear why Board staff are requiring this change. As such, the Aliso Creek WURMP submittal is now inconsistent with the other WURMP submittals both in the date for submittal and the time period for which the report covers.

The submittal date for the Aliso Creek WURMP annual report should be modified to be aligned with the other WURMP submittals. The proposed language modification is as follows:

4. Aliso Creek Watershed RMP Provisions
   b. Each Copermittee must provide annual reports by ~~March 1~~ January 31 of each year beginning in 200~~8~~9 for the preceding annual period of ~~January~~ July 1 through ~~December~~ June 30…

ATTACHMENT C

ORANGE COUNTY ENVIRONMENTAL MONITORING & REPORTING PROGRAM COMMENTS ON CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION TENTATIVE ORDER No. R9-2009-0002 NPDES NO. CAS0108740

INTRODUCTION

Attachment C contains the principal technical comments of the County of Orange (the "County") regarding the monitoring and reporting requirements in Attachment E of Tentative Order No. R9-2009-0002 dated March 13, 2009 ("Tentative Order").

The County has endeavored to provide a complete set of comments on the Tentative Order. However, the County reserves the right to submit additional comments relating to Tentative Order No. R9-2009-0002 and the supporting Fact Sheet/Technical Report to the Regional Board in the future.

GENERAL COMMENT

"monitoring is most useful when it results in more effective management decisions, specifically management decisions that protect or rehabilitate the environment." (NAS, 1991)

In 2002 and 2003, the Permittees completed development of the San Diego Region Receiving Waters Monitoring and Reporting Program and the San Diego Region Dry-Weather Monitoring Program for wet and dry weather, respectively. Compared to prior monitoring efforts (pre NPDES, First and Second Permit Term Programs), the Third Permit Term monitoring program comprised a wider array of methods and a broader range of locations intended to effectively support the development and implementation of the Drainage Area Management Plan (DAMP). The specific comments provided below are intended to ensure that any changes to environmental monitoring requirements are based on careful strategic assessments of the current effort to ensure that revisions ultimately continue to most effectively support DAMP implementation. Also, at a time of unprecedented fiscal challenge there can be no required commitment of additional resources to environmental monitoring. Any new monitoring requirements will require offsetting and compensatory reductions in existing monitoring obligations.

SPECIFIC COMMENTS

II.A.1. Analytical Testing Requirements for Mass Loading, Urban Stream Bioassessment, and Ambient Coastal Receiving Water Stations (Table 1)

The 6-hour holding time for samples of indicator bacteria limit the length of time that sampling teams can spend in the field and do not allow sampling of some episodic events. A typical day of Bioassessment monitoring at three locations requires 8 hours in

the field for PHAB assessment, and collection of benthic macroinvertebrate, water quality, and toxicity testing samples. Mass Emissions monitoring of stormwater runoff can occur on weekends and holidays when contract laboratory services are not available. Most importantly, monitoring bacteriological quality of stormwater at Mass Emissions site will not produce useful information since access to flood control channels is prohibited during periods of stormwater runoff and the Mass Emissions monitoring sites are generally great distances upstream of the coastal receiving waters.

Proposed Modification:

Exempt monitoring of bacteriological quality at Bioassessment sites and during stormwater events at Mass Emissions sites.

Monitoring for oil and grease concentration will not detect lighter petroleum fractions such as gasoline and diesel. Oil and grease has rarely been detected in 5 years of monitoring in the Dry Weather Reconnaissance Monitoring Program.

Proposed modification:

Collect a grab sample for oil and grease during stormwater runoff monitoring at Mass Emissions and Ambient Coastal Receiving Water sites. Collect a grab sample for total petroleum hydrocarbons whenever a sheen is observed.

II.A.2.b. Urban Stream Bioassessment Monitoring Frequency [page 7]

A Stormwater Monitoring Coalition (SMC) review of Bioassessment data collected in Southern California has shown that at sites where flow is year-round there is no statistical difference in IBI scores between the spring and fall seasons.

Proposed Modification:

Modify the sampling frequency for Bioassessment to once a year.

II.A.2.b(1) Urban Stream Bioassessment Monitoring - Alternative Frequency Plan/Special Studies [page 8]

The waiver of a single, annual Bioassessment monitoring event to alternatively conduct a study on the effects of PHAB modification on WARM, WILD, and/or COLD beneficial uses of inland receiving waters would not constitute a quid quo pro exchange of resources. The special study would be much more costly

Proposed modification:

The Regional Board should offer a more equitable option for alternative monitoring. One option could be reallocation of saved resources from a once-per-year sampling frequency (proposed above) to a collaborative SMC study on the effects of PHAB modification.

II.A.5.c(2) Coastal Stormdrain Monitoring – Special Investigation Stations [page 13]

It is unclear why the Pearl Street drain is included in the list of priority drains for special investigations. In the latest PEA submittal, Figures C-11.16b and C-11.16c show that none of the 51 samples collected from the surfzone near the drain outlet contained concentrations of indicator bacteria above the AB-411 single sample standards.

Proposed Modification:

Remove special study requirement for the PEARL street drain.

The requirement that all special investigations be concluded by June 30, 2011 does not provide adequate time for determining if conditions in receiving waters are protective, or likely to be protective, of beneficial uses (I.B, Question 1). In order to answer Question 1 sufficiently, an epidemiological study must be conducted. The Doheny State Beach epidemiology study has shown that these methods are quite expensive and require a significant commitment of resources. Question 4 will be best answered when the methods of Microbial Source Tracking are more refined. Extending the reporting period for the special investigations will provide a better basis to address the Regional Board's concern about sources of bacteria and impacts on beneficial uses.

Proposed modification:

Modify the reporting requirements to allow for a phased reporting schedule such as:

- Annual Reports
  - Assess quality of receiving waters relative to AB-411 criteria (Q1)
  - Evaluate spatial extent of runoff influence on surfzone (Q2)
  - Trend Analysis (Q5)
  - Evaluate runoff contribution to bacterial concentrations in the surfzone (Q3)
- Report of Waste Discharge
  - Results of MST studies if methods have been adopted by the SMC (Q4)
  - Results of epidemiological studies if significant impacts have persisted beyond year 3 and natural uncontrollable sources have not been identified.

II.A.6.b High Priority Inland Aquatic Habitats [page 14]

The requirement that the new Inland Aquatic Habitat monitoring program be implemented by the beginning of the rainy season 2010 does not provide adequate time to develop this new monitoring program nor reallocate staff resources from the existing monitoring program. Furthermore, Regional Board staff must recognize that any increase in any specific element of the monitoring effort will need to be offset by strategically considered compensatory reductions in other elements.

Proposed modification:

Program implementation of this new monitoring program should be postponed until the end of storm season 2010-11.

II.B.1 Wet Weather Runoff Monitoring – MS4 Outfall Monitoring [page 15 and May 5 updates]

See comment above with respect to implementation schedule.

Proposed modification:

Program implementation of this new monitoring program should be postponed until the 2010-2011 monitoring year.

II.B.2 Wet Weather Runoff Monitoring – Source Identification Monitoring [page 15]

The requirement that the new Source Identification monitoring program be implemented within each watershed and must begin no later than the 2008-2009 monitoring year occurs during a timeframe prior to permit adoption.

Proposed modification:

Program implementation of this new monitoring program should be postponed until the 2010-2011 monitoring year to allow the Permittees adequate time to develop this new monitoring program and integrate it into the next budget cycle (2001-11).

II.C Dry Weather Non-stormwater Effluent Limits [page 20 and May 5 updates]

The 1-hour composite sampling requirement (if flow is observed) will make monitoring of three sites in a single day (by a single team) difficult because of holding time requirements for bacteriological samples.

Proposed modification:

Dry Weather Reconnaissance monitoring should be conducted with grab samples. Composite sampling should be considered as an ancillary assessment tool for use when additional source identification efforts are deemed necessary.

III.A.1 Reporting Program – Planned Monitoring Program [page 30]

The requirement that the Planned Monitoring Program be submitted September 1st of every year, beginning on September 1, 2009, does not allow adequate time for analysis of the monitoring data from the prior year as it is affected by management actions undertaken throughout the MS4, subject of the annual Performance Effectiveness Assessment.

Proposed modification:

Rather than additional reporting requirements to describe routine monitoring efforts, Board staff and the Permittees should conduct an annual meeting after submission of the Annual Report to discuss the content of the report and any changes to the monitoring program or suggestions for special studies. This approach will promote a more collaborative relationship between the Permittees and Board staff and may help streamline the renewal of future permits.

III.A.2 Reporting Program – Monitoring Annual Report [page 30]

The requirement that the Receiving Waters and Urban Runoff Monitoring Annual Report be submitted October 1st of every year, beginning on October 1, 2010, does not provide adequate time for relevant analysis of the monitoring data collected in the 12-month period immediately prior to the proposed reporting date. Previous annual reports were submitted on November 15th of each year and assessed the results of monitoring activities conducted in the 12-month period ending 4 ½ months prior to the reporting date.

Proposed modification:

The Receiving Waters and Urban Runoff Monitoring Programs Annual Report should be submitted in conjunction with the Unified Annual Report and Performance Effectiveness Assessments

PATRICIA C. BATES
CHAIR, ORANGE COUNTY BOARD OF SUPERVISORS
SUPERVISOR, FIFTH DISTRICT

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September 28, 2009

By E-mail and U.S. Mail

Dr. Richard Wright
Chair
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Subject: Comment Letter, Tentative Order No. R9-2009-0002 NPDES No. CAS0108740

Dear Dr. Wright:

On behalf of the County of Orange, we provide these comments on Tentative Order No. R9-2009-0002, NPDES No. CAS0108740 - *Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watershed of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District within the San Diego Region.* The comments were prepared in consultation with our co-permittees and the cities of Aliso Viejo, Dana Point, Laguna Hills, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano have directed that they be recognized as concurring entities. This cover letter focuses on general areas of concern with the Tentative Order. Detailed technical and legal comments are attached.

At the Public Hearing on July 1, 2009, your Board members highlighted two key issues of common concern: the permit's consistency with May 2009 permit adopted in the Santa Ana Region and cost neutrality with our current permit in the San Diego Region. Permitting consistency is a key issue for the Orange County Stormwater Program because our compliance programs are integrated countywide and four jurisdictions are split between the two regions.

Fundamentally different requirements between our two permits — particularly within the same city — damage the credibility of the regulatory framework and thwart our ability as local government to cost effectively address key environmental mandates. Since the Tentative Order continues to present a number of unprecedented requirements, it is necessary for us to continue to seek revisions to the Tentative Order that support alignment between the North and South County permit requirements.

With respect to "cost neutrality" and cost effectiveness, there are three aspects of the permit to bring to your attention. First, your staff has indicated its intention to remain steadfast on the inclusion of numeric effluent limits for dry weather flows. Even though exceedances of these limits are written to function as "action levels," by using the term "effluent limits" and specifically "numeric effluent limits" (NELs) the permit potentially subjects permittees to mandatory minimum penalties under the Water Code for exceedances of NELs. While we would strongly oppose any effort to impose mandatory minimum penalties in such a situation, the entire process imposes potentially significant legal and transactional costs upon the Permittees.

Our analysis of environmental quality data shows that a number of these NELs will not be achieved at any time or in any part of our storm drain system. Moreover, they are not being achieved at reference sites in areas completely removed from any urban influence. Their technical derivation is clearly flawed and there is no legal requirement for their inclusion. Consequently, we strongly object to the inclusion of NELs in the Tentative Order and would once again recommend the model application of water quality benchmarks in our existing dry weather reconnaissance program as the basis of non-stormwater permitting. This approach will achieve meaningful water quality improvements in a cost effective manner and is consistent with the Santa Ana Region permit.

There is a second cost concern presented by the escalating administrative burden from a number of the Tentative Order's provisions. New requirements arbitrarily establish municipal

responsibility for sanitary sewer collection systems already subject to separate State regulation. Annual inspection of treatment controls in completed land development and redevelopment projects would be required for the first time. Greater regulatory oversight of and attention on private residences and mobile businesses is prescribed. There is a requirement to augment existing countywide, regional, watershed, and jurisdictional plans, with an additional jurisdictional planning process. In addition, technically challenging new standards will need to be developed and implemented for land development. There are also significant new monitoring obligations. All of these new requirements have significant resource implications for local government. In the current economy, local governments in Orange County are dealing with shrinking budgets not unlike State agencies. Consequently, a key test of the acceptability of the Tentative Order will be a calculation that shows that all of the prescriptive new requirements represent the most cost effective and cost neutral means of achieving our common goal of further improved water quality.

Finally, a major portion of the additional cost burden presented by the Tentative Order will ultimately be borne by the proponents of land development and redevelopment projects and therefore new owners of property. There is significant concern here regarding the potential imposition requirements that will stymie redevelopment, lead to limited environmental benefits and possibly even undesirable environmental outcomes, and for which there is currently no technical consensus. To illustrate this uncertainty, each recently released municipal stormwater permit in California applies its own version of hydromodification standards for land development. The North Orange County Permittees are now working to craft a model for land development that presumes the application of low impact development (LID) best management practices (BMPs) based upon a prioritized consideration of infiltration, capture and reuse, evapotranspiration, and bio-retention/bio-filtration, and requires treatment of residual runoff volumes when the application of LID BMPs has been determined to be infeasible at site, sub-

regional, and regional scales. The model will also integrate options for water quality credits and provide for alternate compliance approaches including participation in a watershed project and contributions to an in-lieu fund. Because it is imperative that the Order eventually adopted by the Board provide similar direction for land development as the North County permit, deliver meaningful water quality outcomes, and be accepted by the development community, there is now a vital need for a change in direction in this key area of the Tentative Order.

Our specific comments and concerns pertaining to the legal and policy, technical, and monitoring and reporting provisions of the Tentative Order are presented in the following Attachments:

- Attachment A presents initial comments on our main legal and policy issues.
- Attachment B presents initial technical comments and suggested language on specific requirements contained within the Tentative Order.
- Attachment C includes initial comments on the Monitoring and Reporting Program.

Thank you for your attention to our comments. Please contact Mary Anne Skorpanich at (714) 955-0601 with any questions on this matter.

Sincerely,

Pat Bates
Chair, Orange County Board of Supervisors

Attachment A: County of Orange Legal Comments
Attachment B: County of Orange Technical Comments
Attachment C: County of Orange Monitoring & Reporting Program Comments

cc: John Robertus, Executive Officer
City Permittees

ATTACHMENT A

ORANGE COUNTY LEGAL COMMENTS ON CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION TENTATIVE ORDER No. R9-2009-0002 NPDES NO. CAS0108740

INTRODUCTION

This Attachment A contains the principal legal comments of the County of Orange (the "County") on Tentative Order No. R9-2009-0002 dated August 12, 2009 ("Tentative Order"). Although the Fact Sheet/Technical Report dated August 12, 2009 is referenced in this attachment, the County has not provided detailed legal comments on the document. The County reserves the right to provide additional legal comments, on both the Tentative Order and Fact Sheet/Technical Report, before the close of the public hearing to adopt the Tentative Order.

Regional Board staff suggested that comments on the Tentative Order should focus on changes made since the last draft and errata were presented to the Board on July 1, 2009. However, staff have not provided a "redline" showing these changes. The last public release draft of the Tentative Order was dated March 13, 2009 (this draft itself is published on the Board's web site as a redline). Since that draft, staff have circulated several "tentative" and "draft" updates and errata. Because of potential for confusion that these various drafts, updates and errata have created, the County's comments focus on all substantive issues of concern, including staff's July 1, 2009 Response to Comments. In other words, the County is commenting on changes made and changes not made from prior drafts of the Tentative Order.

The County incorporates by reference its written comments on all prior versions of the Tentative Order (including Tentative Order Nos. R9-2007-0002 and R9-2008-0001) to the extent they have not been adequately addressed by the August 12, 2009 draft.

Primary Legal Comments

I. The Non-Stormwater Provisions of the Tentative Order Are Not Supported by Federal Law

Directives B and C of the Tentative Order include provisions that are not supported by and go beyond the requirements of the Clean Water Act and federal regulations. Directive B.2 is inconsistent with federal law in that it regulates categories of non-stormwater discharges into the MS4 that U.S. EPA explicitly designated as exempt, and gives the Regional Board greater authority over these discharge categories than provided by the federal regulations. Similarly, the numeric effluent limitations imposed on non-stormwater discharges from the MS4 in Directive C are completely without support under the Clean Water Act or federal regulations.

In general, as discussed below, because federal law regulates the discharge of *pollutants* from the MS4, the Tentative Order's differentiation throughout the permit between discharges of stormwater and non-stormwater from the MS4 are inappropriate, confusing and not supported by law.

A. The Clean Water Act and Federal Regulations are Very Clear as to the Scope of Non-Stormwater Regulation Required in an MS4 Permit

Section 402(p)(3)(B)(ii) of the Clean Water Act requires that MS4 permits include a requirement to effectively prohibit non-stormwater discharges into the MS4. The federal regulations include two requirements or provisions designed to begin implementation of the "effective prohibition." 55 Fed. Reg. 47989, 48037 (Nov. 16, 1990). The first provision requires permittees to perform a screening analysis, intended to provide sufficient information to develop priorities for a program to detect and remove illicit discharges.[1] *Id.*; 40 C.F.R. 122.26(d)(1)(iv)(D). The second provision requires permittees to develop a recommended site-specific management plan to ***detect and remove illicit discharges*** (or ensure they are covered by an NPDES permit) and to ***control improper disposal*** to MS4s. *Id.*; 40 C.F.R. 122.26(d)(2)(B). The federal regulations, thus, focus on two types of non-stormwater discharges:

- Illicit discharges (discharges that are plumbed into the MS4 or that result from leakage of sanitary sewer systems); and
- Improper disposal of materials such as used oil and other toxic materials.

Id. at 48055.[2]

Of the second provision to implement the "effective prohibition" standard, the preamble to the federal rule says that permittees are required to "detect and remove" or prevent illicit discharges (or ensure they are covered by an NPDES permit) and to "control" improper disposal. 55 Fed. Reg. at 48037.

1. Illicit Discharges

With respect to detecting and removing illicit discharges, the proposed stormwater rule required permittees to have a program to prevent ***all*** illicit discharges into the MS4. 53 Fed. Reg. 49415, 49472 (December 7, 1988); 40 C.F.R. 122.26(d)(2)(iv)(B)(1). Commenters on the proposed rule suggested that there was no need to prevent numerous categories of commonly occurring discharges that did not pose significant environmental problems. 55 Fed. Reg. at 48037. U.S. EPA disagreed that the commonly occurring discharges would never pose significant environmental problems, but did admit that it was unlikely that Congress intended to require permittees to effectively prohibit "seemingly innocent flows that are characteristic of human existence in urban environments and which discharge to municipal separate storm sewers." *Id.*

As a compromise, U.S. EPA revised the final rule by generally exempting from the illicit discharge prevention program the categories of discharges identified by commenters. As stated in the preamble: "the following categories of non-storm water ***discharges*** or flows [must be addressed by the program] only where such ***discharges*** are identified ***by the [permittee]*** as

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[1] An "illicit discharge" is defined in the federal regulations as any discharge to an MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the MS4) and discharges resulting from fire fighting activities. 40 C.F.R. 122.26(b)(2).

[2] Contrary to the assertion in the Response to Comments, the federal regulations and/or preamble do not define "non-stormwater discharges" as "illicit discharges."

sources of pollutants to waters of the United States..."[3] 55 Fed. Reg. at 48037 [emphasis added]. U.S. EPA summarized the requirement in its *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Application for Discharges from Municipal Separate Storm Sewer Systems*, November 1992 *("Part 2 Guidance Manual")*:

> While EPA does not consider these flows to be innocuous, they are only regulated by the storm water program to the extent that they may be identified [by the permittee] as significant sources of pollutants to waters of the United States under certain conditions.

Part 2 Guidance Manual at p. 6-33.

Where a permittee identifies a specific discharge, within an otherwise exempt category, that is a source of pollutants to waters of the United States, the permittee must address the discharge as part of its illicit discharge program. *See* 55 Fed. Reg. at 47995 (discharges identified on a case-by-case basis); Part 2 Guidance Manual at p. 6-33 (landscape irrigation from a particular site may result in a water quality impact).

2. Improper Disposal

With respect to controlling improper disposal, the preamble provides that permittees' program is to "assist and facilitate in the proper management of used oil and toxic materials." 55 Fed. Reg. at 48056. The regulation itself provides that the program is to include a description of educational activities, public information activities, and other appropriate activities to facilitate the proper management of used oil and toxic materials. 40 C.F.R. 122.26(d)(2)(B)(6). Thus, rather than using a stick to mandate that no used oil or other toxic materials ever enter the MS4, the regulations require that permittees assist and facilitate, through public education, the proper disposal of these materials such that they shouldn't enter the MS4. Improper disposal does not have to be prevented, it has to be controlled.

The Tentative Order ignores much of these clear requirements for regulating non-stormwater through preventing illicit discharges and controlling improper disposal. It allows the Regional Board to identify as sources of pollutants discharges within otherwise exempt non-stormwater categories, rather than just permittees as provided by federal law. It deletes three entire categories of exempt non-stormwater discharges rather than just the specific discharges within those categories that may be a source of pollutants. More significantly, it imposes numeric effluent limitations on non-stormwater discharges from the MS4. Because none of these requirements or acts are authorized by federal law (and the Regional Board has not indicated it is relying on state law), as discussed below in more detail, the County requests that all of them be removed, revised or undone.

[3] In the text of the final rule, the word "only" was dropped. 55 Fed. Reg. at 48071.

B. For Exempt Categories of Non-Stormwater Discharges, Only Where a Permittee Identifies a Specific Discharge of Non-Stormwater to the MS4 as a Source of Pollutants to Waters of the U.S. Must the Permittee Prevent the Discharge to the MS4

Staff's response to the County's May 15, 2009 comment on this issue ignores authority cited by the County, misreads other authority, and fundamentally misconstrues the reason U.S. EPA provided exempt categories of non-stormwater discharges.

The Part 2 Guidance Manual clearly explains, by way of example, that it is only where landscape irrigation runoff from a particular site results in a water quality impact that the MS4 permittee must address the discharge, either through its management plan or by requiring the discharger to obtain an NPDES permit. *See* Part 2 Guidance Manual at p. 6-33 (quoted in the County's May 15, 2009 comment letter). Staff's response to comments does not address this authority. Just because runoff from one site is a source of pollutants to waters of the United States doesn't mean that the entire landscape irrigation category loses its exempt status.

Staff does address language in the preamble to the federal regulation, but misreads it. U.S. EPA explains in the preamble the idea of exempt categories (or components) of non-stormwater:

> [I]n general, municipalities will not be held responsible for prohibiting some specific ***components*** of discharges or flows listed below through their municipal separate storm sewer system, even though such ***components*** may be considered non-storm water discharges, unless such ***discharges*** are specifically identified on a case-by-case basis as needing to be addressed.

55 Fed. Reg. at 47995 (emphasis added). Staff somehow reads this language as providing authority for removing entire categories (or components) of non-stormwater discharges from the list of exempt categories of non-stormwater discharges provided in the federal regulations. The language, however, very clearly refers to "discharges" being identified on a case-by-case basis as needing to be addressed (i.e., a source of pollutants). It does not refer to "categories" being identified as needing to be addressed.[4]

Moreover, as alluded to above, staff's position does not make sense. U.S. EPA established the list of exempt non-stormwater categories because Congress did not intend to require permittees to prohibit commonly occurring, "seemingly innocent flows that are characteristic of human existence in urban environments." 55 Fed. Reg. at 48037. Under staff's position, that is precisely the result. Any time a single discharge from an exempt discharge category is identified as a source of pollutants, the entire discharge category would be subject to the "effective prohibition" standard, regardless of whether any other discharges from that category presented a problem. This is not what U.S. EPA intended.

Finally, the County notes that the Tentative Order is inconsistent with federal law in that it allows the Regional Board to identify as sources of pollutants discharges within otherwise exempt non-

[4] Read in context, the fact that U.S. EPA suggests that a State may include permit conditions that prohibit "these types of discharges where appropriate" simply refers to individual discharges, not entire discharge categories. *See* 55 Fed. Reg. at 48037.

stormwater categories. As discussed above, the federal regulations and guidance are clear that it is the permittees alone that are to identify such discharges.[5]

For all of the above reasons, the County requests that the Board restore the three deleted exempt non-stormwater discharge categories in Directive B.2 (landscape irrigation, irrigation water, and lawn water) and strike "or the Regional Board" from the second line of the first paragraph of Directive B.2.

C. The Proposed Numeric Effluent Limits For Discharges of Non-Stormwater From The MS4 Are Contrary to Federal Law and Could Subject Permittees to Mandatory Minimum Penalties

The Tentative Order proposes numeric effluent limitations for non-stormwater dry weather discharges from the MS4. In its May 15, 2009 comment letter the County pointed out that the Clean Water Act requires that discharges from the MS4 meet the MEP standard, not numeric effluent limitations. The Response to Comments suggests that staff fundamentally misconstrues the authority provided by federal law to regulate MS4s.

1. The Relevant Clean Water Act Provision and Federal Regulations Regulate Discharges From MS4s

In response to Comment No. 39, staff begins their analysis by stating that section 402(p) of the Clean Water Act "regulates the discharge of storm water from a point source." This is not entirely accurate. Section 402(p) does regulate discharges of stormwater from a point source (e.g., the MS4), but it also regulates discharges of non-stormwater from the MS4. More accurately stated, section 402(p)(3)(B) regulates *the discharge of pollutants from the MS4.* In the clearest language possible, the relevant section provides in pertinent part:

> Permits for discharges from [MS4s] . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable [MEP]. . .

33 U.S.C. 1342(p)(3)(B)(iii).

Staff assert that, because section 402(p)(3)(B)(ii) requires permittees to effectively prohibit non-stormwater discharges into the MS4, the MEP standard in section 402(p)(3)(B)(iii) must apply only to discharges of stormwater. In essence, staff would re-write the Clean Water Act to provide:

> Permits for discharges from [MS4s] . . . shall require controls to reduce the discharge of pollutants ***in stormwater*** to the maximum extent practicable . . .

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[5] This has been the Regional Board's own position. In its FAQ web page regarding the Orange County MS4 permit, the Regional Board says, referring to the federal regulations, that certain non-stormwater discharges are exempt unless "the municipality determines it to be a source or pollutants…" *See* the Regional Board web site at: http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/ocfaq.shtml

That of course is not what the Clean Water Act says. If Congress had intended to apply the MEP standard only to stormwater discharges from the MS4, as suggested above, it would have been very easy to do. Congress, however, chose to apply the MEP standard to the discharge of *pollutants* from the MS4, regardless of the source. That makes sense in that it is pollutants, not stormwater or non-stormwater, that impacts receiving water quality.[6]

This is consistent with *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999). There, in discussing the two different standards applicable to industrial dischargers and municipal dischargers, the Court consistently tracked the language from the Clean Water Act, referring to "industrial storm-*water* discharges" and "municipal storm-*sewer* discharges." *See* 191 F.3d at 1164-65 (emphasis added). The Court did not refer to the standard as applying to stormwater discharges or non-stormwater discharges. The Court, of course, held that "Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C) [e.g., water quality standards]."

2. All Discharges From the MS4 are Subject to the MEP Standard

Staff assert, in their response to comments and in Finding C.14 that non-stormwater discharges from the MS4 are not subject to the MEP standard. An examination of the federal regulations and preamble indicates otherwise.

The focus of the Clean Water Act and the federal regulations is on a management program or programs. Under the federal regulations, the overall goal of the management program is to include a comprehensive planning process to reduce the discharge of pollutants to the MEP. 40 C.F.R. 122.26(d)(2)(iv). One of the elements of the management program is the illicit discharge prevention program. 40 C.F.R. 122.26(d)(iv)(B)(1). Thus, the prevention of illicit discharges into the MS4 is intended to help achieve the overall MEP standard for discharges from the MS4. This is confirmed by the preamble to the federal regulations where U.S. EPA discusses the required elements of the management plans or programs. According to U.S. EPA:

> [Permittees are required] to develop management programs for four types of pollutant sources which discharge to large and medium municipal storm sewer systems. Discharges from large and medium municipal storm sewer systems are usually expected to be composed primarily of: (1) Runoff from commercial and residential areas; (2) storm water runoff from industrial areas; (3) runoff from construction sites; and ***(4) non-storm water discharges.*** Part 2 of the permit application has been designed to allow [permittees] the opportunity to propose ***MEP control measures for each of these components of the discharge.***

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[6] Staff assert that because the title of section 402(p) is "Municipal and industrial stormwater discharges," section 402(p) must regulate only stormwater discharges. While Congress' focus in enacting section 402(p) clearly was on regulating stormwater, as discussed below it understood that some non-stormwater likely would enter the MS4. To protect water quality, it thus chose to regulate all pollutants discharged from the MS4, not simply discharges of pollutants in stormwater. Additionally, from a statutory construction perspective, because the relevant language is clear in section 402(p)(3)(B), there is no need to look to the title of section 402(p) to determine Congressional intent.

55 Fed. Reg. at 48052 (emphasis added). *See also* 55 Fed. Reg. at 48045 ("Part 2 of the proposed permit application [which includes the illicit discharge prevention requirement] is designed to . . . provide municipalities with the opportunity of proposing a comprehensive program of structural and non-structural control measures that will ***control the discharge of pollutants, to the maximum extent practicable, from municipal storm sewers.***") (Emphasis added.)

Thus, just as the discharge of non-stormwater into the MS4 is subject to the "effective prohibition" standard, the discharge of pollutants in non-stormwater from the MS4 is subject to the MEP standard.

3. No "Narrative Prohibition" or "Zero Discharge" Requirement

In their Response to Comments, staff then go on to assert that the effective prohibition standard applicable to discharges of non-stormwater to the MS4 is, in effect a "narrative prohibition" of discharges of non-stormwater from the MS4; i.e., a "zero discharge" requirement. In support, staff assert that non-stormwater discharges are defined as "illicit discharges." This, again, is inaccurate.

First, as discussed above, "non-stormwater discharges" are not defined in federal law. As made clear in the preamble to the federal regulations, U.S. EPA intended to implement the "effective prohibition" mandate of the Clean Water Act by focusing on two types of non-stormwater discharges -- illicit discharges and improper disposal. While non-exempt categories of illicit discharges must be prevented from entering the MS4, improper disposal needs only be controlled, not prevented. Moreover, it is to be controlled not through direct enforcement or some "stick" approach, but rather through public education. In other words, U.S. EPA acknowledged and accepted that some non-stormwater likely would enter the MS4.[7] There is not a "narrative prohibition" or "zero discharge" requirement on non-stormwater discharges from the MS4. This doesn't present significant risk to water quality, however, because all pollutants discharged from the MS4 must be controlled or reduced to the maximum extent practicable.

Second, as noted, U.S. EPA's approach to regulating non-stormwater arises from trying to implement the Clean Water Act's "effective prohibition" standard. Congress did not say that non-stormwater discharges into the MS4 had to be "absolutely prohibited" or "completely prohibited" or even just "prohibited." Congress said that non-stormwater discharges into the MS4 had to be "effectively prohibited." As indicated by U.S. EPA's regulations, something may be effectively prohibited even when some of it is allowed. Effectively prohibiting the discharge of non-stormwater into the MS4 suggests that some non-stormwater may still enter the MS4.[8] Thus, there is no "zero discharge" requirement on discharges of non-stormwater from the MS4.

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[7] This focus on two types (not *the* two types) of non-stormwater also suggests that U.S. EPA acknowledged and accepted that some non-stormwater likely would enter the MS4.

[8] The Clean Water Act is not the only federal statute with an "effective prohibition" standard. For example, under Telecommunications Act, local zoning agencies' regulation of cell towers cannot "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i)(II). In challenging zoning board actions, plaintiffs must prove that the zoning board's action constituted an "effective prohibition" of cell phone service. Courts have held that a zoning board can allow some service and still be subject to an "effective

4. BMPs versus NELs

Next staff appear to suggest that, because permittees' efforts at addressing non-stormwater discharges into the MS4 have not been successful, under 40 C.F.R. 122.44(k) and 122.44(d)(1), the Board can impose numeric effluent limits on discharges from the MS4. Once again staff is mistaken.

Section 122.44(k) simply provides that NPDES permits shall include BMPs (when applicable) under certain circumstances. The regulation does not govern when NELs must be included in an NPDES permit. Staff characterize permittees' efforts to address non-stormwater discharges into the MS4 as BMPs and then, because staff assert the BMPs are not working, suggest section 122.44(d)(1) allows the Board to impose numeric effluent limits on the discharge of non-stormwater from the MS4. To the extent section 122.44(d)(1) is applicable, it does not require numeric effluent limitations. It simply provides the method for determining when effluent limitations generally -- not necessarily a numeric limit -- are required to achieve water quality standards.

Because nothing in sections 122.44(k) or 122.44(d)(1) require numeric effluent limitations on the discharge of non-stormwater from the MS4, staff's reliance on these two sections is misplaced.

5. State Board Order WQ 2009-0008

In the August 12, 2009 Fact Sheet/Technical Report, staff place reliance on the State Board's recent Los Angeles County TMDL decision (WQ 2009-0008 [LA County TMDL Order]) to support the notion that the Clean Water Act requires (or at least authorizes) NELs for discharges of non-stormwater from the MS4. Such reliance is misplaced.

The issue in the LA County TMDL Order was not whether the Regional Board could impose NELs on discharges of non-stormwater from the MS4. The issue addressed in the order was the implementation of dry weather wasteload allocations (WLAs) in the LA County MS4 permit. The relevant TMDL established a bacteria WLA for summer dry weather of zero days of exceedance of the bacteria water quality standards. The TMDL included a WLA for MS4s.

The Los Angeles Regional Board amended the LA County MS4 permit to implement the summer dry weather bacteria WLA. As amended, the permit provided, as a receiving water limitation, that during summer dry weather "there shall be no discharges of bacteria from MS4s into the Santa Monica Bay that cause or contribute to exceedances in the Wave Wash, of the applicable bacteria objectives." The amendment also included corresponding discharge prohibition language. Los Angeles County argued that the receiving water limitation and discharge prohibition were improper numeric effluent limits and that, therefore, the permit amendment should be remanded.

The State Board disagreed. Interpreting summer dry weather as applying only to non-stormwater flows the Board found the authority cited to by LA County as inapposite. The State Board found, generalizing federal law, an overarching principle that "[f]ederal law requires municipal storm water permit limitations to be consistent with applicable wasteload allocations."

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prohibition" claim. In other words, an effective prohibition is not an absolute prohibition. *See, e.g. Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620 (1st Cir, 2002) (Court analyzed the common meanings of "effective" and "prohibition.")

Order WQ 2009-0008 at p. 9. Finding the permit amendment to be consistent with the dry weather bacteria WLA and with other federal and state requirements, the Board upheld the amendment.

Significantly for purposes of the Tentative Order, the Board held that the permit amendment *did not* impose NELs as asserted by LA County, but rather receiving water limitations.

> The contested provisions are receiving water limitations, not numeric effluent limitations. The contested provisions do not impose a numeric limitation measured at a point source outfall. Instead, compliance with the limitation is measured in the receiving water, and more specifically, at the "wave wash" for the individual beaches.

Order WQ 2009-0008 at p. 10.

By comparison, the NELs at issue here are to be measured at a point source outfall -- "at the end-of-pipe ***prior to discharge into the receiving water.***" Tentative Order, Directive C.4 (emphasis added). Thus, because the LA County order pertains to implementing a TMDL through receiving water limitations, it provides no support for staff's assertion that NELs are appropriate (or required) for non-stormwater discharges from the MS4.

Because NELs are not required by federal law, the County requests that Directive C be removed from the Tentative Order.

6. NELs, SALs and MMPs

The Tentative Order includes both NELs for the discharge of non-stormwater and stormwater action levels (SALs) for the discharge of stormwater. Both require that permittees monitor discharges from the MS4. To the extent exceedances of either the NELs or SALs are detected, permittees have to investigate and address the probable cause of the exceedance. An exceedance of either an NEL or an SAL is not a violation of the permit per se.

With respect to the NELs in Directive C, the Tentative Order explicitly provides that compliance requires that an exceedance of an NEL must result in investigation of the source of the exceedance and a determination that the source is natural in origin, an illicit discharge, or a discharge from an exempt category of non-stormwater discharge.[9] Depending on the source, appropriate action is required. Similarly an exceedance of a SAL requires that permittees to reevaluate and augment their stormwater control measures.

Notwithstanding that an NEL exceedance is not a permit violation and compliance with the NELs requires investigation and appropriate action, an exceedance of an NEL may still subject permittees to mandatory minimum penalties (MMPs) under section 13385 of the Water Code. The Tentative Order acknowledges this possibility in footnote 12 where it provides that permittees may not be subject to MMPs if they can show that an exceedance was caused by an intentional act of a third party.

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[9] As discussed above, the three possible outcomes upon an NEL exceedance ignore the fact that the source of the exceedance could be from improper disposal, not an illicit discharge.

Because there is little if any substantive difference between the NEL and SAL requirements, there is no reason for the difference in terminology. The County submits that, to the extent the final Order will include provisions similar to those currently provided in Directive C (and as discussed above the County strongly believes it should not), they should be re-characterized as non-stormwater action levels.[10]

C. Because NELs Are Not Required By Federal Law, To The Extent The Board Has Authority to Impose Them, The NELs Must Be Authorized by State Law and the Board Must Comply With All State Law Requirements

Neither the Clean Water Act nor the federal regulations require NELs in MS4 permits. Staff's prior "tentative draft update" of the Tentative Order conceded this significant point: "Compliance with numeric limits does not constitute compliance with CWA requirements which require non-storm water discharges into the MS4 to be effectively prohibited. . . " June 18, 2009 Draft Updates (Tentative) at p. 9 of 56.

To the extent the Board has discretion under the Clean Water Act to impose NELs (*see Defenders of Wildlife, supra*), the California Supreme Court has made it clear that the Board must comply with state law requirements. *See City of Burbank v. State Water Resources Control Board*, 35 Cal.4th 613 (2005). These state law requirements include considering the water quality that could reasonably be achieved by the NEL requirement, and economic considerations. *See* Water Code sections 13263(a) and 13241. Moreover, because the NEL requirement is not mandated by federal law, it would constitute an impermissible unfunded state mandate (unless the State proposes to fund the costs of implementing the program). *See, e.g., County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.[11]

For all of the above reasons, the County requests that the Board revise the Tentative Order consistent with and pursuant to federal and state law.

II. Compliance With the Wasteload Allocations in The Tentative Order Should be Subject to the Iterative BMP Process

Finding E.11 provides that the Tentative Order incorporates only those MS4 WLAs developed in TMDLs that have been adopted by the Regional Board and approved by the State Board, OAL, and U.S. EPA. However, federal law does not require that MS4 permits incorporate WLAs as numeric limits. Nowhere in the Clean Water Act, or the federal stormwater or TMDL regulations, does it say that MS4 permits shall incorporate TMDLs/WLAs. The federal regulations do say that, when developing water quality-based effluent limits ("WQBELs") under 40 C.F.R. 122.44(d), the permitting authority must ensure that effluent limits developed to protect a

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[10] In a similar vein, the County suggests that, as the purpose of Directive C appears simply to provide some type of performance criteria to the effective prohibition requirement in Directive B, Directive B could be revised to include the non-stormwater action levels. For example, Directive B.4 could provide that "follow up investigations must be conducted as necessary ***and at a minimum upon an exceedance of a non-stormwater action level identified in Table 4*** to indentify and control any non-prohibited discharge categories."

[11] To the extent the Board can impose the NEL requirement, the County would argue that compliance with an NEL should be considered to be compliance with the effective prohibition requirement in Directive B.1.

narrative water quality criteria, a numeric water quality criteria, or both, "are ***consistent with*** the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7" 40 C.F.R. 122.44(d)(1)(vii)(B) (emphasis added).

This section itself does not apply to all NPDES permits. Section 122.44(d) applies only when an NPDES permit must include provisions to achieve water quality standards established under section 303 of the Clean Water Act (33 U.S.C. 1311). As discussed above, the Ninth Circuit in *Defenders of Wildlife* has held that MS4 permits do not have to strictly comply with water quality standards under section 303.[12] Thus, section 122.44(d) does not necessarily apply to MS4 permits.

Even if it is applicable, section 122.44(d)(1)(vii)(B) simply says that WQBELs in the permit must be "consistent with the assumptions and requirements" of the WLA.[13] The permit does not have to incorporate the WLA as a numeric effluent limitation. U.S. EPA has indicated that an iterative BMP approach is appropriate for incorporating WQBELs in MS4 permits; numeric WQBELs are not required. 61 Fed. Reg. 43761 (Aug. 26, 1996) (U.S. EPA's "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits").[14]

The County appreciates that Directive I of the Tentative Order provides that permittees are to achieve the interim and final WLAs through implementation of BMPs.[15] To be consistent with U.S. EPA's guidance, this section should be revised to clarify that any exceedances of the WLAs will be addressed through the iterative BMP approach.[16] As receiving water limitations, this would also be consistent with the required language of State Board Order WQ 99-05.

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[12] In its response to comments, staff quotes from an unidentified letter from U.S. EPA to the State Board in support of staffs' assertion that, notwithstanding the *Defenders of Wildlife* decision, "MS4s must indeed comply with water quality standards." Response to Comment No. 54. The County notes that the letter in question is apparently dated January 21, 1998, before the *Defenders of Wildlife* decision.

[13] The State Board's Office of Chief Counsel has confirmed the appropriate approach: "Under the [federal] regulations, WQBELs must be 'consistent with the assumptions and requirements of any available wasteload allocation . . . .' (40 C.F.R. § 122.44(d)(1)(vii)(B).) The regulations do not require WQBELs to be 'equivalent to' available waste load allocations." Memorandum from Chief Counsel, Craig M. Wilson, to State Board Chairman, Arthur Baggett, Jr., *Legal Authority for Offsets, Pollutant Trading, and Market Programs to Supplement Water Quality Regulation in California's Impaired Waters* (October 16, 2001), page 2.

[14] Contrary to staff's assertion in The Fact Sheet's discussion of Finding E.11, U.S. EPA's guidance does not state that, when adequate information exists, MS4 permits are to incorporate numeric WQBELs. Rather, U.S. EPA's guidance states that "where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits." 61 Fed. Reg. at 43761.

[15] Directive I.1.a should be revised to clarify that the interim and final WLAs are described in Tables 6 and 7, not just Table 6.

[16] We note that in staff's response to comments, staff stated that an iterative process would be used to meet the WLAs. *See* Response to Comment No. 59.

III. Any Water Quality Benefits Achieved From the Retrofitting Requirement Will Be Significantly Outweighed by The Costs

The Tentative Order would require permittees to develop and implement a retrofitting program for existing development. While the County agrees that retrofitting existing development could have beneficial water quality impacts, the program required by the Tentative Order would be very expensive to develop and implement with very little if any water quality improvement to show for the effort. Moreover, the program is not authorized or required by federal law.

Permittees would be required to identify existing development candidates, evaluate and rank the candidate sites to prioritize them for retrofitting, cooperate with landowners of priority sites and encourage them to retrofit their properties, and track and inspect all sites that do complete retrofitting. Where constraints at a candidate site preclude retrofitting, permittees may propose regional mitigation projects. The weak link of this program is that permittees cannot force private landowners to retrofit their properties. So after all the expense of developing this program, there may be nothing gained from it.

Because permittees cannot necessarily force private landowners to retrofit their developments, U.S. EPA recognized that MS4 regulation would largely be limited to undeveloped sites (and sites being developed/redeveloped). "[O]pportunities for implementing [structural control] measures may be limited in previously developed areas." 55 Fed. Reg. at 48054. "The unavailability of land in highly developed areas often makes the use of structural controls infeasible for modifying many existing systems." *Id.* at 48055. As a result, none of the five required components to reduce pollutants in runoff from commercial and residential areas include a retrofitting requirement. *Id.* at 48054-55.

Because the retrofitting requirement as proposed in the Tentative Order would exceed the requirements of the Clean Water Act, the Board can impose the requirement, if at all, only after it has considered certain factors, including economic considerations and the water quality condition that could reasonably be achieved by the requirement. *See* Water Code sections 13263(a) and 13241; *City of Burbank, supra,* 35 Cal.4th 613. In addition, unless funded by the State, the retrofitting requirement could be considered to be an impermissible unfunded state mandate. *See, e.g., County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898.

The County therefore requests that the retrofitting requirement be significantly revised or deleted from the Tentative Order.

IV. Permittees Should be Provided Flexibility in Implementing Any Low Impact Development And/Or Hydromodification Management Plan Requirements

The County agrees that the concepts of Low Impact Development and reducing hydromodification may be effective tools in controlling the discharge of pollutants from the MS4. However, the County objects to the LID and hydromodification management plan (HMP) requirements in the Tentative Order because they go beyond the requirements of federal law and violate state law requirements.

Because nothing in the Clean Water Act or federal regulations requires that MS4 permits include LID or HMP requirements, as noted above, the Board can impose the requirements, if at all, only after it has considered certain factors, including economic considerations and the water

quality condition that could reasonably be achieved by the requirement. *See* Water Code sections 13263(a) and 13241; *City of Burbank, supra,* 35 Cal.4th 613. In addition, unless funded by the State, these programs could be considered to be impermissible unfunded state mandates. *See, e.g., County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898.

In addition, because the Board can require that permittees meet the MEP standard but cannot prescribe the manner in which they do so, the LID/HMP requirements violate Water Code section 13360(a).[17]

V. Stormwater Action Levels May Be a Useful Tool But Permittees Should Benefit From Their Use

The County appreciates the revisions that have been made to the Stormwater Action Levels (SALs) section of the Tentative Order. While we do not necessarily agree that the SAL provision, as currently crafted, is appropriate, we do agree that the concept of action levels may be a useful tool in addressing water quality impacts from the discharge of pollutants from the MS4. However, just as an exceedance of a SAL may give rise to a presumption that permittees are not meeting the MEP standard, to the extent permittees are meeting the SALs, there should be a presumption that they are meeting the MEP standard. That presumption would be lost if permittees do not implement other required elements of the permit.

The County suggests that Directive D.3. be revised accordingly.

Additional Legal Comments

I. Findings

Finding D.3.c. -- Urban Streams

The County has previously objected to the Board's characterization of urban streams as part of MS4. We point out now that, in addition to all of the other reasons why urban streams should not necessarily be considered to be part of the MS4, U.S. EPA has explicitly rejected this characterization. In the preamble to its proposed stormwater rule U.S. EPA states: "The Agency also wants to clarify that streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purpose of this rule." 55 Fed. Reg. 49415, 49442 (December 7, 1988).

II. Directives

Directive A.3.b -- Prohibitions and Receiving Water Limitations

As noted in the County's May 15, 2009 comments, Finding A.3 says the permit is consistent with the State Board's precedential Order 99-05. However, the language in Directive A.3.b (which requires permittees to continue the iterative process unless directed otherwise by the Executive Officer) is not consistent with Order 99-05 (which says permittees do not have to

[17] Finding D.2.c. asserts, without support, that LID BMPs are an acceptable means of meeting the MEP standard.